No. 280.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING COMPANY,
Plaintiff in Error,
vs.
ALTOONA QUICKSILVER MINING COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Clerk U. S. Court of Appeals.

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THE ALTOONA QUICKSILVER MINING CO.,
Defendant in Error.

Brief of Defendant in Error.

The defendant in error brought its action of ejectment, in the U. S. Circuit Court in and for the Ninth Circuit, Northern District of California.

Pleadings.

The complaint alleged:

1. The due incorporation of the parties.

2. The residence of the plaintiff in the Northern District of California, and the residence of defendant outside of the State of California.

3. The value of the property involved to be more than $2000.

4. That the properties involved in the litigation are real estate situated in the Northern District of California.

5. That the plaintiff was the owner and entitled to the possession of two certain water ditches, known as the Altoona (or Crow Creek) Ditch and the Boston Ditch, both of said ditches taking water from Crow Creek and Wiltz Gulch, and conveying said water to plaintiff's mines, known as the Altoona Quicksilver Mines; also the right, by means of said ditches, to take and divert from said Crow Creek and Wiltz Gulch at all times 500 inches of running water, measured under a 4 inch pressure, and to convey the same to said plaintiff's said quicksilver mines, and that plaintiff's said right was the first and prior right to take water from said Crow Creek and Wiltz Gulch, and that for more than five years (the period of the Statute of Limitations applicable to actions to recover possession of real estate in California), viz: for the period of fifteen years prior to the alleged wrongful acts of the defendant, the plaintiff, and its grantors and predecessors in interest, had been in the notorious, exclusive adverse possession of said real estate, claiming the same adversely to all the world.

6. That whilst plaintiff was so in possession of said properties, and on, to wit: August 29th, 1893, the defendant entered into and upon the said Boston Ditch and the water right and took possession thereof, and

ousted and ejected the plaintiff therefrom, and still continues to withhold the same from the plaintiff, etc., to plaintiff's damage, etc.

The plaintiff in error, by its answer

1. Denied plaintiff's ownership and right of possession of both of said ditches, and of plaintiff's right to divert water from Crow Creek or Wiltz Gulch by means of said ditches or either of them.

2. Denied the ouster, on or about August 29th, 1893, "for the reason that plaintiff had not been in the possession of the same for about 12 years."

3. Admitted that defendant was in possession of the Boston Ditch, and thereby taking the water from Crow Creek and appropriating the same to its own (defendant's) use; and also admitted the holding and withholding by defendant of said property; but denied the wrongful character of such holding or withholding.

4. Alleged the defendant to be the owner of said Boston Ditch, and of the first right to divert the waters of Crow Creek and Wiltz Gulch to the full capacity of said ditch, and to apply said waters to its own (defendant's) uses; and that it (defendant) had been in such possession and user for five years prior to the commencement of the suit.

5. Defendant also specially pleaded that plaintiff had abandoned said ditch and water right, and that after such abandonment defendant, about May 2nd, 1892, duly located and took possession of said ditch and water right as

its own, and, ever since, held, possessed, and owned the same in its own right, etc.

6. Defendant also pleaded the Statute of Limitations.

Issues for Trial.

Thus, by the pleadings, the only real issue between the parties was the ownership and right of possession of the plaintiff to the Boston Ditch, with its appurtenances, viz: the first right to take the waters of Crow Creek and Wiltz Gulch; and, as involved in that issue, the issues of abandonment and the Statute of Limitations.

Trial and Judgment.

The issues of fact were tried by a jury, before Judge McKenna, a verdict rendered for the plaintiff (defendant in error), and a judgment duly entered in favor of the plaintiff (defendant in error) for the Boston Ditch and its appurtenances.

Writ of Error.

A bill of exceptions taken at the trial was duly settled, and the cause comes before this Court upon a writ of error sued out by the defendant (plaintiff in error). (No motion for new trial.)

Assignment of Errors.

The appellant assigns and relies upon forty-four errors. They seem to be too numerous to deal with individually, and counsel for defendant in error submits his views upon them, classified as follows:

Class 1.

Evidence of the ownership by defendant in error and its grantors of the Altoona and Trinity Quicksilver Mining Claims, to which claims the Boston Ditch extended, and on which claims the respondent and its predecessors in interest used the waters diverted by said ditch.

Class 2.

Evidence of acts of ownership and claim of ownership performed by defendant in error upon and as to the Boston Ditch and water right, including the leasing of the same to other parties and the use of the same by such lessees.

Class 3.

Evidence of the value and condition of defendant in error's quicksilver mines, for use in connection with which the respondent acquired, extended, and held the Boston Ditch.

Class 4.

Evidence of the beneficial uses to which the Boston Ditch and water right had been put and could be put upon the quicksilver mines of defendant in error.

Class 5.

Evidence as to the intention of the defendant in error with regard to its ownership and the use of the Boston Ditch and water right.

Class 6.

Instructions and evidence as to the abandonment of ditches and water rights.

CLASS 7.

Instructions and evidence as to the non-user of the Boston Ditch and water rights, and the effect thereof.

CLASS 1.

Evidence of the ownership by defendant in error and its grantors of the Altoona and Trinity Quicksilver Mining Claims, to which claims the Boston Ditch extended, and on which claims the respondent and its predecessors in interest used the waters diverted by said ditch.

To this class belong Assignments of Error Nos. 1, 2, 3, 4, 5, and 32.

The evidence objected to in these assignments of error was admissible for the purpose of showing that the respondent had use for the water upon mining claims which it owned, such ownership being proven by the valid location, holding, and conveyances in a regular chain of title, bringing the title down to itself.

Assignment No. 32 is fully met by the proposition that when a U. S. patent issues for a mining claim it recognizes and confirms all rights and titles from the date of a valid location down to the issuance of the patent. It grants no new rights, but simply incontestably establishes by record precedent rights relating to the location upon which the patent is based. For these purposes, the patent was not to be excluded from the evidence, although it bore date subsequent to the commencement of the suit.

Vide, 98 Cal. 332, *Jacob* v. *Lorenz*.

The necessity and propriety of the evidence of the ownership of these quicksilver mines by respondent is emphasized in the recent opinion of the Supreme Court of Cali-

fornia (*Smith* v. *Hawkins*), from which case counsel for appellant quotes so *in extenso* in his brief. Quoting from the opinion of the Court in that case (*Vide* page 40 of appellant's brief):

"For the period of five years and more next before the "commencement of the action the dam, ditch, and water "right claimed by plaintiffs have not been used by Ross, "or any one who has succeeded to his interest, for any "useful or beneficial purpose. *Neither he nor they have "ever owned any property below the head of that ditch, to "which the water could be applied.*"

But again this evidence was admissible for the purpose of showing that respondent had useful purposes to which to apply the water, viz: to the mining of quicksilver ores upon mines owned by it.

Civil Code of California, Sec. 1411.

Class 2.

Evidence of acts of ownership, and claim of ownership performed by defendant in error upon and as to the Boston Ditch and water right, including the leasing of the same to other parties by defendant in error, and the use of the same by such lessees.

This class includes Assignments of Error Nos. 6, 7, 12, 13, 14, 15, 16, 22, 31, and 39.

In considering Nos. 6 and 7, the Court should read the evidence which shows that, under the written contracts shown under those two assignments, the respondent's lessees used the ditch and water right in dispute until a short time before appellant seized the possession of them.

(*Vide* transcript, middle of page 81, also page 54.) Evidence under Nos. 12, 13, and 22, was also admissible under appellant's plea of abandonment.

The evidence shows that, under written and oral leases from the defendant in error, the Boston Ditch and water right were used various years, to wit: nearly every year from 1876 to the ouster, by different parties. Appellant objects to this. Respondent claims that it is pertinent evidence for two reasons: 1st, It tends to rebut the alleged abandonment; 2nd, Use by the tenant is use by the landlord, and such evidence proves user. Possession by tenant is possession by the landlord.

Cal. C. C. P., Sec. 326.

This doctrine is so well understood and its application so frequent, that we do not deem it necessary to cite further authorities to the point. The other numbers under this class are exceptions to evidence, that whenever any other person, including appellant, attempted to use the Boston Ditch and water right, that the respondent always asserted its ownership of the property, and enforced recognition of its ownership. This evidence was admissible both against defendant's pleas of abandonment and of the Statute of Limitations, or prescription.

Class 3.

Evidence of the value and condition of the quicksilver mines of defendant in error, for use in connection with which the respondent acquired, extended and held and used the Boston Ditch and water right.

Assignments of Error Nos. 8, 9, 10, 11, 21, 33, 34, and 36 belong to this class.

The authorities hereinafter cited show clearly that the Supreme Court of California has not only held this class of evidence admissible, but extremely important, in the class of cases to which the case at bar belongs, and especially where the question of abandonment and appropriation of water for beneficial purposes is involved. The Boston Ditch conveyed water to these mines. To prove the extent and known value of the mines and the large amounts of money expended upon them by respondent was pertinent to the question of whether respondent had in fact. or had ever intended, to abandon the ditch and water right, which formed so essential an element in their operation.

Class 4.

Evidence of the beneficial uses to which the Boston Ditch and water right had been put, and could be put, upon the quicksilver mines of defendant in error.

This class includes Assignments Nos. 17, 18, 19, 20, 21, 26, 27, 29, and 30.

That the defendant in error has used the ditch and water for beneficial purposes, and had still further uses for it in future was pertinent and admissible evidence, and was also evidence tending to rebut any contention of abandonment of the ditch and water right by the defendant in error.

Class 5.

Evidence as to the intention of the defendant in error with regard to the use of the Boston Ditch and water right by it.

This class includes Assignments Nos. 23, 24, 25, and 35. (N. B. There is an error in the figures *1887*, in line 3 of Assignment No. 23. Instead of 1887, it should read *1877*. See transcript, p. 86, lines 9, 10, and 11.)

The intention of the party, where a question of abandonment is involved, is one of the controlling elements. See authorities hereafter cited.

Class 6.

Instructions and evidence as to the abandonment of ditches and water rights.

This includes the assignments under classes 3, 4, and 5; and also Assignments Nos. 37 and 38.

We submit that the charge given by the Circuit Court as to the loss of the right of a prior owner and possessor to a ditch and water right by abandonment was full, clear, direct, and correct (See authorities hereafter cited.) Abandonment involves both act and intention. To clearly understand the portions of the charge assigned as error, it will be necessary for this Court to examine the context of the extracts contained in the assignments of error. (See transcript, pp. 121, 123–4.)

Class 7.

Instructions and evidence as to the non-user of the Boston Ditch and water rights, and the effect thereof.

This includes Assignments Nos. 41, 42, and 44.

A brief statement of the evidence at this point will assist the Court.

The evidence shows that the Crow Creek Ditch, one of the ditches described in the complaint, was the first ditch

built out of Crow Creek, and was completed (see transcript, evidence of Hawkett, p. 23; Horan, p. 26; Lytle, pp. 29–31; Littlefield, p. 34; Butler, p. 39), and took water to the quicksilver mines of defendant in error from both Crow Creek and Wiltz Gulch, and that defendant in error had become the owner and user of said Crow Creek Ditch, water right, and quicksilver mines before the Boston Ditch was commenced. That, in 1875, the Boston Ditch was commenced by Butler and Worland, who also owned the Boston Mine. (See transcript, evidence of Butler, p. 39.) They afterwards sold the Boston Mine and uncompleted ditch to the Boston Cinnabar Mining Company (a corporation), which completed the ditch, and used the water from Crow Creek and Wiltz Gulch, diverted by it, on the Boston Mine. (See transcript, evidence of Butler, pp. 39–40.) That, August 17, 1877, the Boston Cinnabar Mining Co. sold and deeded the Boston Ditch and water right to the defendant in error. (See transcript, pp. 39, 40, and 41.)

That the defendant in error then extended the ditch to its quicksilver mines, and built a reservoir to accumulate the water for its uses, on the line of the ditch above defendant in error's mines (see transcript, evidence of Butler, p. 49; evidence of Osgood, pp. 65 and 66.)

That thereafter the defendant in error and its lessees used the Boston Ditch and water right almost continuously until the Boston Ditch and water right were seized and held by force and threats by the appellant, in 1892.

That the same waters and water rights were used by defendant in error interchangeably between the two

ditches, which were so situated that one of the ditches was available for use upon one portion of the mines of defendant in error, and the other ditch upon other portions of the said mines of defendant in error.

Morris Osgood testified that defendant in error used the Boston Ditch and water right through the seasons of 1879, 1880, 1881, and 1883. (*Vide* transcript, pp. 65 to 69).

C. M. Butler testified to its use by himself and father under agreement with the defendant in error, at the Boston Mine, in 1885, 1886, 1887, 1888, and 1889, and on the Loring Claim in the last of those years. (*Vide* transcript, pp. 81–83.)

M. D. Butler testified to the use of the Boston Ditch and water by defendant in error in 1883, and by himself, by permission and agreement with defendant in error, in 1885, 1886, 1887, 1888, and 1889, up to August 1st. (*Vide* transcript, pp. 41, 42, 43, 45, 46, 48, 49, 51, 53, and 54.)

F. H. Loring testified to use of the Boston Ditch and water in 1881, 1882, 1883, and 1884, by the defendant in error, and by himself under written lease from the defendant in error. (*Vide* transcript, pp. 56, 57, 58, 59, 60, and 61.)

W. B. Littlefield testified to use of the Boston Ditch and water right by defendant in error in 1876, 1877, and 1878, or 1877, 1878, and 1879. (*Vide* transcript, pp. 34, 35, 36, 37, and 38.)

Patrick Horan testified, that while working for the Altoona Company, he used the Boston Ditch and water

right on their mine for three years, and that one of the years was 1878. (See transcript, p. 34.)

Dack testified to the use of the Boston Ditch and water right by the Butlers in 1885 and 1889. (See transcript, evidence of Dack, pages 64 and 65.)

Morris Osgood testified that he was ditch tender for the defendant in error during the years 1879, 1880, 1881, and 1883, being absent from that locality in 1882, and that the Boston Ditch and water right was used through the Boston Ditch by the defendant in error during the years 1879, 1880, 1881, and 1883. (See transcript, pages 66, 67, 68 and 69.)

Allenberg testified to the use of the Boston Ditch and water right by the defendant in error in 1878.

Louis Girard testified that he was superintendent of the defendant in error's properties in the fall of 1884, and that in September, 1884, he cleaned out the Boston Ditch, its entire length, for the defendant in error. That in 1885 the supply of water for the Boston Ditch was not sufficient to use at the Altoona Mine. That the Altoona Company used the Boston Ditch and water right in 1880 on its mines. That in 1886 he, as superintendent for defendant in error, leased the Boston Ditch and water right to the Butlers, who used it for mining until he left the mine in 1889. (See transcript, pp. 73, 74, 75 and 76.)

So the evidence clearly shows the purchase of the Boston Ditch and water right from its previous owner, in 1877, by the defendant in error, and their use by defendant in error and its lessees, until and including

1889, during every water season (undisputed), except 1885, in which year defendant in error had no use for that ditch, but that year cleaned it out its full length.

The plaintiff in error pleads in its answer and claims its right to the Boston Ditch and water right by virtue of a re-location of the same, made May 2nd, 1892. (See transcript, water location, contained in answer of plaintiff in error, pages 13 and 14.)

The evidence shows that the plaintiff in error first turned the water into the Boston Ditch and used it in July, 1892. (See transcript, evidence of Carter, p 102; evidence of McCaw, p. 106.) That August 9th and 17th, 1892, Butler, acting as superintendent of the properties of defendant in error, turned the water away from the Boston Ditch to the Altoona Ditch, and posted notices notifying all parties that the Altoona Company claimed the properties, and not to interfere with it. (See transcript, evidence of Butler, p. 49, and 50, and 54.) N. B. The Loring claim, the El Madre Mine, the Davis Mine, and the claim marked "Ruby" on defendant's Exhibit 2, are the same claim, under different names. (See evidence of Loring, p. 61; evidence of Girard, p. 75; evidence of C. M. Butler, p 82.)

The evidence also shows that, from '77 to '92, the same water right was used interchangeably through the Altoona Ditch on defendant's mine, up to the trial of the suit. (See evidence of Hawkett, pp. 23, 24, 26, and 27; Lytle, pp. 30, 31, and 32; Littlefield, pp. 34 and 35; M. D. Butler, pp. 43, 49, and 81; Dack, pp. 64 and 65; Osgood, pp. 80, 81, and 83; Girard, pp. 73 and 75.)

The Law of Water Rights and Ditches in the State of California, as Declared by the Court of Last Resort in That State.

Appropriation and Right of Appropriator.

7 Cal. 46, *Hoffman* v. *Stone:*

"The first appropriator of water acquires a special "property in the waters thus appropriated, and as a "necessary consequence might invoke all legal remedies "for its defense or use."

12 Cal. 27, *Kimball* v. *Gearhart:*

"Possession or actual appropriation is the test of "priority in all claims to the use of water, where such "claims are not dependent upon the ownership of the "land through which the water flows." (The Riparian right.)

15 Cal. 162, *Kidd* v. *Laird:*

"As to the character of the property which the owner "of a ditch has in the water actually diverted by and "flowing in his ditch, with reference to such water, his "power of control and right of enjoyment are ex- "clusive and absolute, and it is a matter of little prac- "tical importance whether in a strict legal sense it be, "or be not, private property."

25 Cal. 504, *Union Water Co.* v. *Creary:*

"The right to the use of a water course in the public "mineral lands, and the right to divert and use the "water taken therefrom, may be held, granted, aban- "doned, or lost, by the same means as a right of the

" same character issuing out of lands to which a " private title exists."

96 Cal. 214, *Ramelli* v. *Irish:*

"Appropriation upon Public Land—Rights of Appro- " priator Against Purchaser from Government.—The " right to the use of water flowing in a stream over " public lands of the United States may be acquired by " appropriation; and when such appropriation has been " made for some useful or beneficial purpose, the rights " acquired by the appropriator will be recognized and " protected as against any other person who subse- " quently obtains title to the land from the govern- " ment."

32 Cal. 27, *Davis* v. *Gale:*

"A person who has appropriated the water of a stream, " and caused it to flow to a particular place by means of " a ditch, for a special use, may afterwards change the " use to which he first applied the water, and the place " at which he used it, without losing his priority of " right, as against one who has dug a ditch from the " same stream before the change is made.

" One who has appropriated the water of a stream by " means of a ditch for the purpose of working a par- " ticular mining claim, may, after he has worked out the " claim and abandoned the same, extend his ditch and " use the water at other points, and for a different pur- " pose, without losing his priority of right as against " one who afterwards dug a ditch from the same " stream and appropriated water before the claim was " worked out.

"Appropriation and use for a beneficial purpose are "the tests of right to water in the mineral regions, "while the place and character of its use are not such "tests."

67 Cal. 267, *Junkans* v. *Bergin:*

"Point of Diversion May be Changed.—One entitled "to divert a quantity of water from a stream may take "it at any point on the stream, and may change the "point of diversion at pleasure if the rights of other "appropriators be not injuriously affected by the "change."

96 Cal 214, *Ramelli* v. *Irish:*

"Change of Place of Diversion--Change of Use.— "A person entitled to the use of the waters of a stream "by appropriation may change the place of diversion, "or the place where it is used, or the use to which it "was first applied, if others are not injured by such "change."

No Notice of Location of Ditch or Water Right Necessary.

101 Cal., pp. 107 and 112. *Waterson* v. *Saldunbehire:*

"Where there has been an actual appropriation and "use of water, a right to it is acquired, regardless of "the provisions of the Civil Code, for the acquisition "of water rights."

79 Cal. 587. *Conredt* v. *Hill:*

"Code Requirements as to Appropriation.—So far as "defenses to an action for diversion of water are

" founded upon the Statutes of Limitation and equita-
" ble estoppel, it is immaterial whether the defendant,
" or his grantor, made an appropriation of the water in
" compliance with the Code requirements as to posting
" notice, etc., or not. To sustain those defenses, the
" actual construction of the ditch which diverted the
" water may be shown without preliminary proof of
" the posting or recording of notices."

80 Cal. 397. *Necochea* v. *Curtiss:*

" Appropriation by Ditch – Non-Compliance with
" Code—Riparian Rights of Subsequent Pre-emptor.—
" In the Act of Congress of July 16th, 1866, a prior
" appropriator of a water right who diverts water from
" its natural channel, by means of a completed ditch,
" prior to the vesting of any rights in a subsequent pre-
" emptor of the land over which the water would nat-
" urally flow, is protected to the extent and in the man-
" ner of such actual and completed diversion, against
" any riparian rights of the subsequent preemptioner,
" notwithstanding the failure or neglect of the prior
" appropriator to comply with the Civil Code as to the
" posting and recording of a notice of appropriation of
" the water right.

" Construction of Civil Code—Effect of Diversion—
" Subsequent Appropriation.—The object of the legisla-
" ture in prescribing in section 1415 of the Civil Code
" that a notice of appropriation of a water right is to be
" posted and record thereof to be made, and in section
" 1416 that work is to be commenced for diversion of
" the water within sixty days after the posting of the

"notice, and to be diligently prosecuted thereafter, &c., "is merely as declared in section 1418, to enable the "claimant to avail himself of relation as against an "intervening appropriator. After the diversion of the "water has been completed and the same has been ap- "plied to a beneficial use, the appropriator has a perfect "right to the water appropriated against all the world, "except the owner of the soil, and those claiming ad- "versely who have complied with the law. Whether a "subsequent appropriator could, at any time after the "completion of the diversion by the prior appropriator, "take the water away from the latter by complying "strictly with the code is not decided."

83 Cal. p. 10, *Hesperia Land & W. Co* v. *Rogers.*

82 Cal. p. 564, *Burrows* v. *Burrows:*

"Prior Appropriation—Failure to Post and Record "Notice.—The failure to post and record a notice of "appropriation will not vitiate a prior actual appropria- "tion of waters flowing upon the public domain as "against a riparian proprietor who subsequently settles "upon and obtains a patent to land below the point of "diversion."

99 Cal. 756, *Wells* v. *Mantes:*

"Compliance with Code.—One who appropriates the "waters of a running stream by an actual diversion "thereof for the purpose of irrigation, acquires the right "to the use thereof as against the claimant who subse- "quently posts his notices upon the stream in accord- "ance with section 1415 of the Civil Code, and pro- "ceeds thereafter as required by statute to perfect his

" rights, although the prior appropriator has not fol-
" lowed the statute in making his appropriation.

" Object of Code Provisions—Relation.—The scope
" and provisions of the Civil Code upon water rights
" was merely to establish a procedure for the claimants
" of the right to the use of the water whereby a certain
" definite time might be established as the date at
" which their title should accrue by relation, and a fail-
" ure to comply with the rules there laid down does not
" deprive an appropriator, by actual diversion of the
" right, to the use of the water as against a subsequent
" claimant who complies therewith.

" The word 'claimants,' in section 1419 of the Civil
" Code, which provides that the failure to comply with
" the rules of the Code, 'deprives the claimants of the
" 'right to the use of the water as against a subsequent
" 'claimant who complies therewith,' refers to a party
" posting and recording the notices required by the
" provisions of section 1415 of the same Code, and does
" not apply to an appropriator by actual diversion.

The Law of Abandonment.

26 Cal. 263. *St. John* v. *Kidd:*

" Abandonment is purely a question of intention.—An
" abandonment takes place when the ground is left by
" the locator without any intention of returning, or
" making any future use of it, independent of any min-
" ing rule or regulation."

36 Cal. 333. *Moon* v. *Rollins:*

" Mere lapse of time does not constitute an abandon-

" ment, but it may be given in evidence, for the pur-
" pose of ascertaining the intention of the parties."

36 Cal. 214, *Bell* v. *Bedrock Tunnel and Mining Co.:*

" As to support the plea of abandonment, it must ap-
" pear from the evidence that there was a leaving of
" the claim, without any intention of returning, or mak-
" ing any further use of it, so it is competent for the
" opposite party to prove, in rebuttal, any acts explana-
" tory of the leaving which tend to show that it was
" not accompanied with an intention not to return."

8 Montana, 389, *McCauley* v. *McKeig:*

" The evidence in a case involving the right to use
" certain water, showed that the defendant had appro-
" priated the same for placer mining purposes in 1869,
" and that in 1872 the plaintiff had appropriated the
" same for irrigating his land; that during the years
" 1878, 1879, 1880, 1882, and 1883, the defendant had
" not used the said water, but that in certain of said
" years the supply was not sufficient for placer mining
" operations. Held, that there had been no abandon-
" ment by the defendant of his prior right to the use of
" said water."

What Constitutes:

Smith v. *Cushing*, 41 Cal. 97:

" To constitute an abandonment, the premises must be
" left vacant without the intention of reclaiming the
" possession, and open for the occupation of any one
" who may choose to enter."

Judson v *Malloy*, 40 Cal. 299:

"To constitute an abandonment, there must be a concurrence of the act of leaving the premises vacant, so that they may be appropriated by the next comer, and the intention of not returning."

Moon v. *Rollins*, 36 Cal. 233:

"If the person in possession of land leaves it, with the intention of returning, he does not abandon it. An abandonment takes place only when one in possession leaves it with the intention of not again resuming possession. Abandonment is, therefore, a question of intention."

Richardson v. *McNulty*, 24 Cal. 339:

"An abandonment can only take place where the occupant leaves the land free to the appropriation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself and regardless and indifferent as to what may become of it in the future."

Lawrence v. *Fulton*, 19 Cal. 683:

"Where, in ejectment, the plaintiff asked the court to instruct the jury, 'that lapse of time does not constitute an abandonment, but that it consists in a voluntary surrender and giving up of the thing by the owner, because he no longer desires to possess it, or thereafter to assert any right or dominion over it;' and the instruction was given with the qualification that lapse of time constitutes the material element in the question of abandonment: Held, that it would be more exact to say that lapse of time constitutes

" *a* material element to be considered in deciding the " question of abandonment, but that the instruction " given and the qualification are, in connection, the " the same in effect."

Ferris v. *Coover*, 10 Cal. 589;

Davis v. *Perley*, 30 Id. 630:

" The doctrine of abandonment only applies where " there has been a mere naked possession without title. " Where there is a title, to preserve it there need be no " continuance of possession: and the abandonment of " possession cannot affect the right held by virtue of " the title."

Davis v. *Perley*, 30 Cal. 630.

" Abandonment of land is necessarily a question of " intention, but that intention may be gathered from all " the acts of the party alleged to have abandoned."

What Does Not Constitute:

Moon v. *Rollins*, 36 Cal. 333:

" Mere lapse of time does not constitute an abandon- " ment, but it may be given in evidence for the purpose " of ascertaining the intention of the parties."

Moon v. *Rollins*, 36 Cal. 333:

" If one in possession of land leaves it with the in- " tention of returning, his mere failure to occupy the " land for a period of five years does not necessarily " constitute an abandonment. Until adandoned he may " recover against a trespasser, unless his action has be- " come barred by a five years' adverse possession."

Judson v. *Malloy*, 40 Cal. 299:

"The intention to abandon is not necessarily infer-
" able from the fact that the premises have been left
" vacant, unimproved, and without attention for more
" than five years before the commencement of the action,
" but such facts may be taken into consideration in de-
" ciding the question of abandonment."

Richardson v. *McNulty*, 24 Cal. 339:

"When an abandonment takes place, a vacancy in the
" possession is created, and without such vacancy no
" abandonment can take place."

30 Cal. pp. 193 and 201–2, *Wilson* v. *Cleveland:*

"Upon a question of abandonment, the parties should
" be allowed to prove any fact or circumstance from
" which any aid for the solution of the question can be
" derived."

Hoffman v. *Stone*, 7 Cal. 46:

"A ditch company, who avail themselves of a dry ra-
" vine to conduct their water a portion of the distance
" to their dam, where they use it, do not abandon the
" water thus carried by them, and are entitled to the
" same enjoyment of it as if conducted through an ar-
" tificial ditch."

Morenhaut v. *Wilson*, 52 Cal. 263:

"Where a party was driven away from his mine by
" hostile Indians, left his tools in an adjacent mine, and
" did not return prior to a second location by another
" party, for the reason that he supposed the Indian
" hostilities continued, because of the required expen-

"diture of money, and because he believed he had "done sufficient work upon the mine to hold it: Held, "that there was not that intent necessary to constitute "abandonment."

Stone v. *Geyser Q. M. Co.*, 52 Cal. 315:

"In the trial of an issue as to whether mining "ground had been abandoned by the plaintiff before the "defendant's entry, the fact that the defendant be- "lieved the mine had been abandoned by the plaintiff "when he entered, is not to be taken into consideration "by the jury in determining the issue."

Stone v. *Geyser Q. M. Co.*, 52 Cal. 315:

"The question of abandonment can never arise, ex- "cept when there has been possession, and then the "question is simply whether the possessor intended to "return, and whether he intended to return in good "faith or bad faith."

EVIDENCE OF:

Partridge v. *McKinney*, 10 Cal. 181:

"The law will not presume an abandonment of prop- "erty in a dam and ditch for mining purposes from the "lapse of time."

Keane v. *Cannovan*, 21 Cal. 291:

"An abandonment may, in some cases, be inferred "from the lapse of time, and the delay of the first occu- "pant in asserting his claim to the possession against "parties subsequently entering upon the premises; but "in such cases the leaving of the premises must have

" been voluntary, and without any expressed intention " of resuming the possession."

Keane v. *Cannovan*, 21 Cal. 291:

" The fact that a party, when ceasing to occupy prem- " ises, left an agent in charge of them, is of itself suffi- " cient to rebut the presumption of abandonment, aris- " ing from the cessation of his occupancy, and to render " the question of abandonment one of intention proper " for determination by a jury from the circumstances."

Richardson v. *McNulty*, 24 Cal. 339:

" In an action to recover possession of a mining " claim, where the defense is an abandonment of the " claim by the plaintiff, the judgment roll in an action " brought by the plaintiff against third parties to recover " possession of the same ground, and in which plaintiff " recovered judgment, is admissible in evidence to rebut " the presumption of abandonment.

" In such cases the Court should guard the jury, by " proper instructions, from giving the judgment any " weight in evidence, except upon the question of aban- " donment."

Wilson v. *Cleaveland*, 30 Cal. 192:

" If the plaintiff in ejectment relies upon prior pos- " session, and the defendant attempts to prove aban- " donment by the plaintiff before his entry, the plaintiff " should be allowed a wide range in proving facts and " circumstances to rebut the alleged abandonment."

Roberts v. *Unger*, 30 Cal. 676:

" When, in ejectment on prior possession, abandon-

" ment is pleaded and evidence on it introduced, the " case should be left to the jury."

Bliss v. *Ellsworth*, 36 Cal. 310:

" Evidence tending to show that a party who, upon " proper notification to him as the owner and occupant " of certain lots in an incorporated city, had caused the " streets fronting on the same to be graded, as required " by such notification, is pertinent and material in re- " buttal of a claim that he had abandoned said lots, as " tending to show his continued acts of ownership and " control of the same; also, as tending to illustrate the " character and *bona fides* of his possession of said lots."

EFFECT OF:

93 Cal., p. 519, *Herman* v. *Hunnewill:*

" By discontinuance of use is meaant abandonment."

95 Cal., p. 268, *Aliso Water Co.* v. *Baker*;

96 Cal., p. 228, *Hulsman* v. *Todd.*

ABANDONMENT AMD NON-USER:

106 Cal., p. 392, *397*, *Utt* v. *Frey:*

" Appellant contends that if the plaintiff or his prede- " cessor in interest ever had any irrigation water right " in said ditch, it was lost by abandonment. The right " which is acquired to the use of water by appropriation " may be lost by abandoment. *To abandon such right is* " *to relinquish possession thereof without any present intention* " *to repossess.* To constitute such abandonment, there " must be a concurrence of act and intent, viz: the " act of leaving the premises or property vacant, so that

" it may be appropriated by the next comer, and the " intention of not returning. (Authorities.) The mere " intention to abandon, if not coupled with yielding up " possession, or a cessation of user, is not sufficient; nor " will the non-user alone, without an intention to aban- " don, be held to amount to an abandonment. Aban- " donment is a question of fact to be determined by a " jury, or the Court sitting as such. Yielding up pos- " session and non-user is evidence of abandonment, and, " under many circumstances, sufficient to warrant the " deduction of the ultimate fact of abandonment. But " it may be rebutted by any evidence which shows that, " notwithstanding such non-user, or want of possession, " the owner did not intend to abandon. But little water " was used for several years, and the ditch became ob- " structed so that it would carry but little water. But " that did not constitute abandonment."

The last case cited, viz: *Utt* v. *Frey*, 106 Cal., pp. 329–97, is a very complete exposition of the law of abandonment as to water rights and ditches, and instructions given by the Court on the subject are clearly supported by that decision.

In reviewing the brief of the plaintiff in error, we find that its attorney lays great stress upon the case of *Smith* v. *Hawkins*, 42 Pacific Reporter, page 453, and remarks with seeming candor that the case is in conflict with the rulings and instructions of the Court at the trial of the case at bar. We submit that a careful consideration of the case will show most material differences, and very important ones, in the two cases, and that the case in itself is full authority for the correctness of the action of the

Circuit Court in refusing to give certain instructions asked by the plaintiff in error at that trial, and which refusal to give such instructions is the basis, in part, for this appeal. Counsel for appellant in error seem, in their brief, to have overlooked important features of that case: First, in that case the plaintiff, who claimed a ditch and water right, had neither by himself, nor any tenant, nor any other person in any manner claiming under him, made any use of his ditch and water right for thirteen years next preceding the commencement of his suit. True, he had leased his ditch and water right for two months at $15 a month, which had been paid to him, but such lessee made no use of the ditch or water right. The defendant in that case owned riparian lands below the head of plaintiff's ditch, and had himself constructed a ditch out of the same stream on defendant's own lands, and for more than five years next preceding the commencement of the suit had continuously used his own ditch and water right, consisting of the taking of the waters of said stream through the defendant's ditch; and it was upon that ground that the Supreme Court rendered a decision in favor of the defendant; and all this appears by the quotations from the decision, in respondent's brief (pages 39 to 44). The only other point of importance decided in that case was, that where a man made no use of a ditch constructed over patented lands, for a continuous period of five years, that thereby, under Sections 1411 and 811, subd. 4, of the Code of Civil Procedure of California, he lost his right to the ditch and water right; thereby giving a construction to the following language in Section 1411 of our Code of Civil Procedure, viz:

"And when the appropriator or his successor in in-
" terest ceases to use it for such purpose the right
" ceases."

At the trial of the case at bar, counsel for appellant in error contended that any ceasing to use the ditch and water right, no matter for how short a time, destroyed the appropriator's prior right. This case of *Smith* v. *Hawkins*, cited by counsel, decides that the true construction of that section is, that the cessation of user must continue for five years, unless abandonment be proven In the case at bar the Boston Ditch and water right were used by the defendant in error and its lessees every year, beginning with 1876, up to and including the first day of August, 1889. The plaintiff in error first claimed a right to the ditch and water right May 2nd, 1892, and the defendant in error commenced this action of ejectment on the 4th day of December, 1893, so that there was no possibility of the doctrine announced in that case, as to five years' non-user, becoming applicable to the defendant in error, and during a portion of that time, viz.: from August, 1892, to December, 1893, the defendant in error was kept out of possession of the ditch and water right by force and threats of the officers of the plaintiff in error. (See transcript, evidence of Butler, pp. 47 and 48.) The Circuit Court instructed the jury in clear terms, that "when the appropriator or his succes-
" sor in interest ceases to use the water for a beneficial
" purpose, the right ceases." (See transcript, pp. 120–121.) The jury, by its verdict in favor of the defendant in error, found that it had not ceased to use

the water for a beneficial purpose, and this finding was fully in accord with the case cited by counsel for plaintiff in error, viz: *Smith* v. *Hawkins;* for the evidence clearly showed that the plaintiff had not ceased to use the ditch and water right for a period of five years prior to the commencement of the suit. As the evidence clearly showed—and there was no conflict in the evidence whatever upon the point—that the defendant in error, by its lessees, used the ditch up to August 1st, 1889, there being no conflict, it would not have been error for the Court to refuse to give an instruction, that if the defendant in error had not used the Boston-Ditch and water right for five years prior to the commencement of the suit, that thereby he lost his right, for that there was nothing in the evidence calling for such an instruction; but, furthermore, the plaintiff in error asked for no such instruction.

Specification of Error No. 40 is not well taken, for that it is at variance with the law of abandonment, as shown by the authorities above cited. The authorities are clear, that intention is a strong element in the question of abandonment.

Specification of Error No. 41 is not tenable. The element contained in the first sentence of the rejected instruction was fully given by the Court. (See bottom of page 120 of the transcript.) The element contained in the second sentence is not applicable to the evidence in the case; for the evidence showed a use by the respondent in error and its lessees, year by year, for a period of fourteen years. The elements contained in sentence 3 were not applicable: first, because there was no evidence tending

to show that the Altoona Quicksilver Mining Company did not, since the year 1881, use any of the waters that ran through the Boston Ditch, and also because it left out of consideration entirely the use of the Boston Ditch and water right by the tenants of the Altoona Quicksilver Mining Company. The elements contained in lines 5, 6, and 7, of page 156, of said specification, were not applicable; for there was no evidence tending to show that the respondent in error claimed the Boston Ditch and water right for the sole purpose of preventing others from using such water for a beneficial purpose.

Specification of Error 42. the refusal of the Court to give the instruction found at page 156 of the transcript, was not error. The Court instructed the jury (see page 120) that an appropriation of water must be for some useful or beneficial purpose, and that a cessation of use worked a cessation of the right. The offered instruction was also wrong in leaving it entirely to the jury to determine what constitutes a reasonable time in such cases; for the Supreme Court says, in the case of *Smith* v. *Hawkins*, cited by counsel for appellant, that a mere failure to use, without abandonment, does not cause the right to lapse, unless such cessation continues for five years; and, in that respect, the instruction was erroneous. If the Court instructed upon that point further than it did, it should not have been that a failure to use for an unreasonable time, but that a failure to use for a period of five years, worked a loss of the right. The instruction contained another error, in the sentence: "The law does not permit a person to "hold water for speculative purposes." This was erro-

neous. The decisions of the California courts are, that a party may not hold water for *merely*, or *purely*, speculative purposes, or for speculative purposes *alone*, or *solely*. That portion of the instruction was inapplicable to the case at bar; for that there was no evidence tending to show that the defendant in error held or had attempted to hold the waters for speculative or merely speculative purposes, but showed clearly that its object in holding the waters was for use upon quicksilver mines. The last clause of the instruction was erroneous. In short, there was nothing in the instruction which was not erroneous, which was not included in the charge given to the jury by the Court. The instruction offered by counsel for plaintiff in error, and refused by the Court, and contained in Assignment of Error No. 43, was correctly refused. The case of *Smith* v. *Hawkins* is directly in conflict with the proposed instruction. The instruction offered was that "the right to the ditch con-" tinues only so long as the ditch is used to convey " water for a needful and beneficial purpose, and " whenever the party who built the ditch, or his " successor in interest, ceases to use the same *for an* " *unreasonable length of time*, for the purpose of convey-" ing water to be used for a needful purpose, then the " rights of the party who built the ditch, or his suc-" cessors in interest, end" The case of *Smith* v. *Hawkins* decides, not that the right was lost by a failure to use for a reasonable or unreasonable time, but that the right was lost by a failure to make any use of it for a period of five years. The decision has fixed a specific time, a definite period. This offered instruction

undertook to leave it to the jury to determine for themselves what the time should be, based wholly upon what the jury should consider a reasonable or unreasonable length of time. The right of the defendant in error depends upon a statute of the State of California. The Supreme Court has construed that statute, and construed it that the right is lost by a failure to use for five years. The instruction asked by the appellant in error, was that the right would be lost by a failure to use for an unreasonable length of time.

The instruction refused, and contained in Specification of Error No. 44, was properly refused. The elements contained in sentence 1 of that instruction were given in the instructions of the Court. The elements contained in the second sentence are in direct conflict with the decision of *Smith* v. *Hawkins*. Under that decision the right to use water does not terminate when the use is discontinued, but does terminate when the use is discontinued for a period of five years, or when the right is abandoned. The element contained in next to the last sentence was not warranted by the evidence in the case. There was no evidence tending to show that the purpose for which the water was originally appropriated, had failed. On the contrary, the evidence showed that there were still vast deposits of ore in the Altoona Quicksilver Mines to be worked and concentrated, but it also showed that the Altoona Company had other uses to which it could put the water, and to which it contemplated putting the water, and to which it would have put the water, had it not been for its protracted litigation, and had not the plaintiff in error interfered with its possession.

It is not out of place in this portion of the argument to call attention to the fact that a number of the specifications in error are based on the proposition that the respondent in error, against objection, was allowed to prove that the mine still contained, and had always been known to contain, vast deposits of paying cinnabar, or quicksilver ore. The correctness of the ruling of the Circuit Court in admitting this evidence is manifest in connection with these specifications of error, viz: that it was the duty of the Court to admit evidence tending to show that the purpose for which the water was appropriated had not been fully accomplished, but that there were still vast deposits of known quicksilver mining ore. left to be worked by the use of this ditch and water right; and to establish this fact beyond a controversy, the quantity and value of the quicksilver ore actually mined, above the level of the tunnel, and the large deposits of the same character that were thereafter still in sight in the bottom of the tunnel, viz: an ore chute of valuable ore, 800 feet in length, and from two to twenty feet in width; that it had been worked out above the level of the tunnel, and that was still visible for that distance in the bottom of the tunnel, during the whole period of time in which plaintiff in error claims that he ought to have had an instruction of the purport that, if the uses for which the water had been appropriated had ceased, etc. The last sentence of this instruction was not applicable to the case at bar. There was no evidence in the case tending to show any act of defendant in error, "upon the prin-
"ciple of the dog in the manger."

We respectfully submit that there is no conflict between the decisions of *Utt* v *Frey*, 106 Cal. 397–398, and *Smith* v. *Hawkins*, 42 Pacific Reporter, p. 453. The one case was upon the doctrine of abandonment, where no cessation of user for a period of five years was shown, as in the case at bar. The other was a case where there had been a cessation of user, not merely for the period of five years, but an absolute non-user of either the ditch or water right for a period of more than thirteen years.

Evidence as to the title of the quicksilver mines of respondent in error was proper evidence to show that the respondent in error had useful purposes to which to apply the water. The decision of *Smith* v. *Hawkins* recites the fact that the plaintiff had leased his ditch and water right for a period of two months at a rental of $15 per month, but emphasized the fact that the lessee had made no use of the ditch and water right, thereby clearly indicating that if the lessee had used the ditch and water right, that, in a proper case, would have been pertinent.

It is with more or less regret that we notice, near the bottom of page 46, and in the middle of page 47, that counsel have taken occasion to intimate that evidence was offered and admitted in this case solely for the purpose of allowing counsel for defendant in error to make an argument that his client, being prodigiously rich, should be awarded a verdict; and that evidence that his client was kept out of possession by threats, was to give an opportunity for eloquence with regard to desperadoes. The former would have been exceedingly foolish,

to say the least, in a trial before a jury, and the latter was for a legitimate purpose, as indicated and urged *supra*. Cases in the Court in which this case was tried are conducted, so far as we have had occasion to observe them, with the greatest decorum, and attorneys are held to unusual strictness in the conduct of cases, in their demeanor, and in the presentation of arguments to juries; and so far as the counsel for respondent in error is concerned, he entirely approves of such conduct at jury trials, and has no disposition to trespass upon such wholesome regulations.

The Judgment Roll.

Under this heading counsel for appellant in error contends that an action of ejectment for the ditch and water right cannot be maintained. We have not contended, nor do we contend, that a judgment in ejectment can be rendered for a water right alone; but it is Hornbook law that the action of ejectment does lie for a corporeal hereditament, and a ditch is a corporeal hereditament It consists of the bottom or bed, and the sides or banks, of the ditch, (which are of the very substance of the earth, and immovable,) and all of the necessary supports to maintain them. A reccovery in ejectment of a corporeal hereditament will be recovery of such corporeal hereditament with its appurtenances; and, in this case, the judgment is for the ditch and its appurtenances. The Supreme Court of California has decided that eject-

ment does lie for a ditch and dam, with its appurtenant water rights. See—

Nevada Co. & Sacramento Canal Co. v. *Kidd et als.*, 37 Cal., pp. 292, 301, 325–7;

Mitchell v. *Canal Co.*, 75 Cal., p. 471.

The case of *Swift* v. *Goodrich*, 70 Cal., pp. 106–7, cited by appellant, was an action brought to enjoin the defendants from using or diverting the waters of a certain stream, and it was an action between two riparian proprietors, and was merely a contention between them as to who had a right to divert water from the stream, and there is nothing in that case holding that a ditch is not a corporeal hereditament, or that ejectment will not lie for it. The other California case cited by counsel for appellant in error, *Tibbetts* v. *Blakewell*, 35 Pac. Rep., p. 1007, was an action of ejectment, in which the ouster was denied. The only evidence of ouster was evidence that defendant had diverted and appropriated the water which the ditch was entitled to take. In such a case, of course, there was no ouster as to the corporeal hereditament.

Counsel for appellant in error, to sustain his contention that ejectment will not lie to recover a ditch, etc., cites three other cases:

1st. *Earl* v. *de Hart*, 72 Am. Dec. 398, from 1 Beardsley's Ch. (N. J.), 280.

This was an action in equity to obtain a mandatory and prohibitory injunction, to prevent and remove obstruction (by an adjoining owner) of a water course which drains the plaintiff's land. The relief was granted on the ground that the relief amounted to the abatement of a nuisance. There is not a word in the case concerning ejectment.

2nd. *Hawley* v. *Shelton*, 33 Am. St. 942, from S. C., 64 Vt. 491:

This was an action to prevent the alleged obstruction of an alleged water course on defendant's land. The jury found there was never any water course on defendant's land. And the Supreme Court sustained the verdict. There is not a word about ejectment in the decision of this case.

3rd. *Chamberlain* v. *Hemingway*, cited as 33 Am. St. 332 (should be 38 Am. St. 332) from S. C., 63 Conn. 1:

This was a suit for an injunction. Plaintiff and defendant owned adjoining lands, the front portion of which was mud flats bordering on salt water. Through these mud flats was a short sluice-way, 300 feet long, back and forth through which the tide ebbed and flowed. At low tide there was no water in the sluice-way. There was no stream of water Defendant, in redeeming these mud flats, partially filled up the sluice-way. Plaintiff brought an action, alleging this sluice-way to be a natural water course, and his rights in the cause turned upon the truth of that allegation. The Courts decided it was not a water course, as it contained no stream of water. There was no question in the case as to the proper form of action, and ejectment is not mentioned in the decision, nor anything relating to the matter of ejectment. The plaintiff claimed "riparian" rights, and the Court decided his rights were "littoral," and not "riparian." But in the case the Court did say: "A water course consists of bed, "banks, and water."

The last case cited in appellant's brief, viz: *Tibbetts* v.

Blakewell, 35 Pac. Rep. 1007, needs no answer, except to call attention to the fact that the case as stated in appellant's brief, was a case where the plaintiff alleged an ouster from a strip of land six feet wide, on which was constructed a ditch. The ouster being duly denied, the only evidence to support the allegation of ouster was that the defendant had diverted the water away from the ditch (at its head) and appropriated it to his own use. It needs no argument to show that these acts did not constitute an ouster of the plaintiff's possession of the ditch.

But in the case at bar, there can be no contention that the respondent in error was not ousted from the possession of the ditch, for the defendant, in its answer, denies the plaintiff's ownership or right of possession of the ditch, and that waives the necessity of any proof of ouster. See —

Salmon v. *Wilson*, 41 Cal., p. 595;
McCrary v. *Everding*, 44 Cal. 284.

Furthermore, in paragraph 8 of defendant's answer (see transcript, near bottom of page 10), the appellant in error "admits that defendant still holds and with-
" holds from the plaintiff the possession of the said Bos-
" ton Ditch and of the water rights connected there-
" with."

We respectfully submit, that there was no error of law in the trial of this case, and that the judgment of the Circuit Court should be affirmed.

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